STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-09-23

Mark L. Randall, and
Randall Law Office, P.A.,

Applicants,

v.

DECISION AND ORDER
(Motion to Vacate/Motion to Confirm)

J. Michael Conley,
Wenonah Wirick, and
Conley & Wirick, P.A.,

Respondents

This matter was heard on June 30, 2009, on Applicants' Amended Motion to Vacate Arbitration Award, and on Respondents' Application to Confirm Arbitration Award.

Factual/Procedural Background

In January 2007, the parties entered into an agreement pursuant to which Applicant Mark Randall became a shareholder in a law firm with Respondents J. Michael Conley and Wenonah Wirick. The parties' Agreement provided that "any and all disputes that may arise between or among them in the future over the terms of the Agreement shall be decided by binding Arbitration, if any Party demands Arbitration." A year later, Respondents Wirick and Conley demanded arbitration based on Applicant Randall's alleged failure to comply the terms of the Agreement.

In connection with the arbitration proceeding, both parties identified numerous issues that would be the subject of the proceeding. On October 23, 2008, after a three-day hearing in July 2008, the arbitrator (Patrick Coughlan) issued a decision, in which the arbitrator wrote that he "retain[ed] jurisdiction for purposes of clarification and to enter such other rulings as may be necessary." On

November 21, 2008, and December 9, 2008, the arbitrator issued clarification orders as to the amount of money that Applicant Randall owed to Respondents Wirick and Conley. In addition, after review of an affidavit from Respondent Conley representing that Applicant Randall had failed to make payment in accordance with the arbitration award, the arbitrator found Applicant Randall in contempt and imposed sanctions.

In this action, Applicants assert that the arbitrator exceeded his authority in the initial award, and in issuing his subsequent orders. Applicants also contend that the arbitration award was obtained by fraud or other improper means. Respondents maintain that the award was properly entered and, therefore, seek to confirm the award.

Discussion

Section 5927 of Maine's Uniform Arbitration Act (14 M.R.S. §§ 5927-5949) provides that "... a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." 14 M.R.S. § 5927. When parties to an arbitration agreement have arbitrated their dispute and an arbitration award has been issued, either party may apply to the court for confirmation of the award and entry of a final judgment. *See* 14 M.R.S. §§ 5937 & 5940.

After an application for confirmation has been filed, "the court *shall* confirm an award, unless" grounds are timely "urged for vacating or modifying or correcting the award, in which case the court *shall* proceed as provided in sections 5938 and 5939." 14 M.R.S. § 5937 (emphasis added). Sections 5938 and 5939, in turn, provide in relevant part:

> § 5938. Vacating an award
>
> 1. VACATING AWARD. Upon application of a party, the court shall vacate an award where:
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> A. The award was procured by corruption, fraud or other undue means;

B. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

C. The arbitrators exceeded their powers;

D. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 5931, as to prejudice substantially the rights of a party;

E. There was no arbitration agreement and the issue was not adversely determined in proceedings under section 5928 and the party did not participate in the arbitration hearing without raising the objection; or

F. The award was not made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court has ordered, and the party has not waived the objection.

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

§ 5939. Modification or correction of award

1. APPLICATION. Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

A. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

B. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

C. The award is imperfect in a matter of form, not affecting the merits of the controversy.

14 M.R.S. §§ 5938 & 5939.

A. The October 23, 2008, Arbitration Order

In this case, Applicants argue that the Court should vacate the initial arbitration order because the arbitrator exceeded his authority when he issued his the decision. In particular, Applicants contend that

the arbitrator addressed issues and granted relief that were beyond the scope of the parties' agreement. The Court can vacate an award if the arbitrator goes beyond the scope of the dispute submitted for arbitration. *Westbrook School Committee v. Westbrook Teacher's Ass'n*, 404 A.2d 204, 207 (Me. 1979).

The record reveals that the arbitration award was consistent not only with a fair reading of the arbitration agreement, but also the parties' interpretation of the scope of the agreement. In fact, in response to the demand for arbitration, Applicants, through counsel, wrote "if any party demands arbitration ... then all disputes between the parties are to be decided by arbitration."[1] In accordance with the parties' interpretation, the parties identified numerous issues when they requested arbitration. The scope of the issues identified and actually presented to the arbitrator confirms that the parties considered the arbitration proceeding to be the forum in which they would litigate all the issues that were generated by Applicant Mark Randall's separation from the law firm that the parties had established through the execution of their written agreement.

Applicants' contention that the arbitrator was not authorized to grant the specific relief that he ordered similarly fails. Not insignificantly, the arbitration agreement does not define or limit the nature of the relief available to the arbitrator. In the absence of an express limitation, the arbitrator must be permitted to grant the relief that the arbitrator believes is reasonably necessary to resolve the issues that are properly before the arbitrator. Otherwise, a party to an arbitration agreement can frustrate the parties' intention and the legitimate purposes of arbitration by challenging an unfavorable decision based on the failure of the parties to identify specifically the available relief in the original agreement. Such a result would be contrary to public policy, and inconsistent with Maine's favorable view of arbitration. *See, Doris Champagne v. Victory Homes, Inc.*, 2006 ME 58, ¶ 9 (citing *V.I.P., Inc., v. First Tree Dev. Ltd. Liab. Co.*, 2001 ME 73, ¶ 4, 770 A.2d 95, 96) (in Maine, a "broad presumption favoring substantive arbitrability" exists).

[1] May 2, 2008, letter from Attorney Kurt Olafsen to Arbitrator Patrick Coughlin and William Robitzek, counsel for Respondents.

Applicants' challenge to the arbitration award on the basis of fraud is also unsupported by the record. In this argument, Applicants rely primarily on a document (i.e., Respondent Conley's notes of a July 18, 2007, meeting with Applicant Mark Randall) that they contend is inconsistent with the testimony before the arbitrator. Applicants assert that they recently located the original notes, and that the notes differ in a material way from the copy introduced by Respondents at the arbitration hearing. According to Applicants, the difference between the notes demonstrates that Respondent Conley altered the notes to benefit Respondents, and that the alleged alteration caused the arbitrator to issue a decision adverse to Applicants.

To vacate the award as Applicants urge, the Court must be convinced that the award "was procured by fraud." 14 M.R.S. § 5938(1)(A). The Court cannot conclude, based solely on a document produced approximately 9 months after the arbitration hearing, that Respondents committed fraud during the arbitration proceeding.[2] Preliminarily, the Court cannot determine whether recently found document would have generated a different result had it been available to the arbitrator. More importantly, even if one of the two documents was intentionally altered as Respondents argue, the Court is not persuaded that the altered document is necessarily the document that was introduced at the arbitration hearing. In other words, the Court cannot conclude on the record before the Court that the initial document was altered, and introduced at the hearing in a deliberate attempt to mislead the arbitrator. Several potential explanations, many of which do not involve fraudulent conduct on behalf of Respondents, exist for the difference between the documents.[3] Applicants have failed to demonstrate, therefore, that the award should be vacated because it was "procured by fraud" fails.

[2] In their March 12, 2009, Amended Motion to Vacate Arbitration Award, Applicants assert that Applicant Randall found the document at his home on February 14, 2009.

[3] For instance, the first document could have been altered by Respondent Conley as Applicants contend, the second document could have been altered by Applicant Randall, or the first document could have been altered at the time of the meeting, but after copies had been made.

B. Clarification Orders

Applicants also argue that the arbitrator exceeded his authority when he issued clarification orders on November 21 and December 9, 2008. Through the clarification orders, the arbitrator purports to clarify the portion of the award by which he awarded to Respondents a portion of a fee paid on two specific cases that the law firm handled.

The First Circuit recently discussed the extent to which an arbitrator's subsequent order constitutes a permissible clarification or an impermissible exercise of power in *Eastern Seaboard Construction Co. v. Gray Construction Co., Inc.*, 553 F.3d 1 (1st Cir. 2008). The First Circuit distinguished between those cases in which the arbitrator attempts to revisit the merits of the case, which would be impermissible, and cases in which the arbitrator seeks to correct a computational or technical error, which would be permissible. The First Circuit's approach is sound and reasonable. In essence, it permits an arbitrator to clarify or amend an award in the event the award does not convey the arbitrator's intent. Without this ability, an arbitrator would be unable to amend an award even when a mistake is obvious.

The issue is whether in this case, in issuing his clarification orders, the arbitrator revisited the merits of the claims, or merely corrected a mistake or miscalculation. In the initial award, the arbitrator clearly intended to order Applicant Randall to pay to Respondents a percentage (75%) of the fee realized by the law firm in two cases. Just as clearly, the arbitrator intended for the referral fee of $40,000 to be deducted before the amount to be paid to Respondents was determined. Based upon a review of the record, it is clear that in the original calculation, the $40,000 referral fee was unknowingly deducted twice. That is, the figure from which the arbitrator deducted $40,000 in the initial order was the product of the fees paid on the cases minus the $40,000 referral fee. The clarification orders were designed to correct that error. Under these circumstances, the orders are within the authority of the arbitrator.

C. February 4, 2009, Arbitration Order

Finally, Applicants maintain that the arbitrator did not have the authority to find Applicants in contempt, and to impose sanctions for allegedly failing to make a payment as ordered by the arbitrator. The Court agrees. Maine law does not authorize an arbitrator to enforce an award. Instead, the law provides a process by which a party can seek the Court's confirmation of an award. *See* 14 M.R.S. §§ 5937 & 5940. If confirmed, the award can be enforced as a judgment of the Court. This is, in the Court's view, the exclusive means by which an award can be legally enforced.

The fact that the arbitrator, as he cites in the February 4, 2009, Arbitration Order, "retained jurisdiction for purposes of clarification and to enter such other rulings as may be necessary" is immaterial. An arbitrator's authority is derived from the parties' contractual agreement and the applicable law. In this case, neither confers upon the arbitrator the authority to exercise the power of contempt.

Conclusion

1. Based on the foregoing analysis, on Applicants' Amended Motion to Vacate, the Court vacates the February 4, 2009, Arbitration Order, and otherwise denies Applicants' amended motion.

2. Based on the foregoing analysis, on Respondents' Motion to Confirm, the Court confirms the October 22, 2008, November 21, 2008, and December 9, 2008, orders of the arbitrator, and denies the motion to confirm the arbitrator's February 4, 2009, order. In accordance with 14 M.R.S. § 5940, judgment is entered in favor of Respondents and against Applicants as ordered in the October 22, November 21 and December 9, 2008, orders of the arbitrator.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 10/2/09

Justice, Maine Business & Consumer Docket